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In The

Supreme Court of the United States

October Term, 1991

IN RE ALAN J. and MARY FRANCES ANTWEIL, husband and wife, HOBBS PIPE & SUPPLY, a general partnership, and MORRIS R. ANTWEIL,

Debtors.

WILLIAM BARNHILL,

Petitioner,

v.

ELLIOT JOHNSON, Trustee,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF PETITIONER

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QUESTION PRESENTED FOR REVIEW

For purposes of establishing a voidable preference under Section 547(b) of the Bankruptcy Code, when payment is made by check, is the effective date of the transfer the date the check is delivered to the payee or the date the check is honored by the drawee bank?

LIST OF PARTIES

The petitioner, William Barnhill, is an individual and a resident of the State of New Mexico. The respondent, Elliott Johnson, is the Trustee, under Chapter 11 of the Bankruptcy Code, of the bankruptcy estates of Alan J. and Mary Frances Antweil, husband and wife, Hobbs Pipe & Supply, a New Mexico general partnership, and Morris R. Antweil, an individual.

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OPINIONS IN THE COURTS BELOW

The April 30, 1991 opinion of the United States Court of Appeals for the Tenth Circuit is reported at *Johnson v. Barnhill (In re Antweil)*, 931 F.2d 689 (10th Cir. 1991), and is reprinted in Appendix A to the Petition for Writ of Certiorari. The prior opinion of the United States District Court for the District of New Mexico is reported at *Johnson v. Barnhill (In re Antweil)*, 111 Bankr. 337 (D.N.M. 1990), and is also reprinted in Appendix B to the Petition for Writ of Certiorari. The prior opinion of the United States Bankruptcy Court for the District of New Mexico is reported at *Johnson v. Barnhill (In re Antweil)*, 97 Bankr. 69 (Bankr. D.N.M. 1989), and is reprinted in Appendix C to the Petition for Writ of Certiorari. (*See* Joint Appendix ["J.A."] 53 for citations to the specific pages in the Appendices to the Petition for Writ of Certiorari.)

JURISDICTIONAL STATEMENT

The respondent, Elliott Johnson, Trustee, filed the Adversary Proceeding which commenced this action on May 12, 1988. The United States Bankruptcy Court for the District of New Mexico had jurisdiction based on 28 U.S.C. § 1334(b) in that the action arises in a case under Title 11 of the Bankruptcy Code and is a core proceeding under 28 U.S.C. § 157(b)(2)(F). (J.A. 5). The Bankruptcy Court issued its Opinion and Orders on March 1, 1989. (J.A. 49, 51). The Trustee timely filed his Notice of Appeal to the United States District Court for the District of New Mexico on March 10, 1989 pursuant to 28 U.S.C. § 158(a). (J.A. 2). The District Court entered its Memorandum

Opinion and Order affirming the Bankruptcy Court on February 27, 1990. (J.A. 2). The Trustee timely filed his Notice of Appeal to the United States Court of Appeals for the Tenth Circuit on March 29, 1990. (J.A. 3). The Tenth Circuit Court of Appeals entered its Opinion and Order reversing the District Court on April 30, 1991. (J.A. 3). The Petition for Writ of Certiorari by William Barnhill was filed July 26, 1991. This Court granted the Petition for Writ of Certiorari on October 7, 1991.

STATUTES INVOLVED

This case involves the Bankruptcy Code, 11 U.S.C. § 547(b) and 11 U.S.C. § 101(54), which provides as follows:

11 U.S.C. § 547

. . .

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of interest of the debtor in property –

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made –

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if –

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

The full text of 11 U.S.C. § 547 is set out in Appendix D to the Petition for Writ of Certiorari. (*See* J.A. 54 for citation to the specific pages of the Appendices to the Petition).

11 U.S.C. § 101

(54) "transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption.

STATEMENT OF THE CASE

Alan J. and Mary Frances Antweil, Hobbs Pipe and Supply, and Morris Antweil (the "Debtors"), filed Voluntary Petitions for Relief under Chapter 11 of the Bankruptcy Code on February 18, 1986. (J.A. 1). The cases were

jointly administered under United States Bankruptcy Court for the District of New Mexico Case No. 11-86-00254 MA. The respondent, Elliott Johnson (the "Trustee"), was appointed Trustee under Chapter 11 of the Bankruptcy Code on May 15, 1986, and accepted the appointment as Trustee on June 3, 1986. (J.A. 1). The Chapter 11 Plan of Reorganization for the Debtors was confirmed by the May 6, 1988 Order of the Bankruptcy Court. (J.A. 1).

The Trustee commenced Adversary Proceeding No. 88-0136M on May 12, 1988 by filing his Complaint to Recover Preferential Transfers. (J.A. 1). In his Complaint, the Trustee sought to avoid alleged preferential transfers to four creditors, including petitioner, William Barnhill. (J.A. 4-15). The three creditors other than William Barnhill were not parties to the proceedings on appeal in the Courts below, and the claims against them are not at issue in this case.

With respect to petitioner, William Barnhill, the Trustee alleged that the Debtors, by check dated November 19, 1985, transferred $157,148.22 to William Barnhill as payment for past due invoices. (J.A. 6, Paras. 5 and 6). The Trustee also alleged that the November 19, 1985 transfer occurred within 90 days of filing of the Bankruptcy Petitions by the Debtors. (J.A. 6, Para. 5). The Trustee requested that the transfer be voided as a preferential transfer and that judgment be awarded against William Barnhill in the amount of $157,148.22. (J.A. 6-7).

On June 17, 1988, William Barnhill filed a Motion to dismiss the Complaint on the grounds that the Complaint failed to state a claim upon which relief could be granted

and that the Bankruptcy Court lacked subject matter jurisdiction over the property. (J.A. 16-17).

The Trustee filed a First Amended Complaint to Recover Preferential Transfers on October 6, 1988. (J.A. 1). The amendments in the First Amended Complaint affected the claims against other defendant creditors, but did not materially alter the allegations against William Barnhill. (J.A. 19-29).

On October 11, 1988, the Trustee filed a Motion for Leave to File Second Amended Complaint to Recover Preferential Transfers, with a proposed Second Amended Complaint attached as an Exhibit to the Motion. (J.A. 2, 30-40). The Trustee's Motion sought to amend the Complaint on the grounds that the Trustee had re-examined evidence and believed it provided a basis for asserting an alternative claim against William Barnhill that the transfer occurred on November 20, 1985. (J.A. 31, Para. 1). The proposed amendment in the Second Amended Complaint alleged that the check was delivered to William Barnhill by Debtors on November 18, 1985, the check was dated November 19, 1985 and the check was honored by the drawee bank on November 20, 1985. (J.A. 36, Para. 7).

William Barnhill filed an Objection to the Trustee's Motion for leave to file a Second Amended Complaint on October 13, 1988. (J.A. 2). Barnhill objected to the Motion on the grounds that the transfer had occurred either November 18 or 19, 1985, that regardless of whether the effective date was the 18th or the 19th of November, the Trustee could not avoid the transfer, and that the Motion was premature until the Bankruptcy Court decided the pending Motion to Dismiss. (J.A. 42).

On October 13, 1988, William Barnhill also filed a second Motion to Dismiss the First Amended Complaint. (J.A. 2). The second Motion sought dismissal of the First Amended Complaint on the same grounds as the Motion to Dismiss the original Complaint. (J.A. 46).

The Bankruptcy Court issued its Memorandum Opinion on March 1, 1989. (App. C to Petition, 24a.) In the Memorandum Opinion, the Bankruptcy Court took judicial notice of its file and found that the 90th day before filing of the Bankruptcy Petitions was November 20, 1985.[1] (App. C to Petition, 25a.) Further, relying in part on the case of *Bernstein v. RJL Leasing (In re White River Corp.)*, 799 F.2d 631 (10th Cir. 1986), the Bankruptcy Court found that a date of delivery rule should apply to Section 547(b) preference actions and that both the date of the check and the date of delivery of the check were outside the 90 day preference period. (App. C to Petition, 26a-27a.)

Based on its decision that a date of delivery rule should apply, on March 1, 1989, the Bankruptcy Court denied the Trustee's Motion to file a Second Amended Complaint and granted the Motions to Dismiss the claims against William Barnhill. (J.A. 49, 51).

Pursuant to 28 U.S.C. § 158(a), the Trustee appealed the Bankruptcy Court's Orders to the United States District Court for the District of New Mexico on March 10,

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[1] This finding is not at issue in this case. Based on Court rulings in a prior appeal, the parties agree that November 20, 1985 is on or within 90 days before the date of the filing of the Petition, but that November 19, 1985 is outside the 90 day period.

1989. (J.A. 2). The parties submitted briefs and, on February 27, 1990, the District Court entered its Memorandum Opinion and Order affirming the rulings of the Bankruptcy Court. (J.A. 2). The District Court held that the Bankruptcy Court properly relied on the case of *Bernstein v. RJL Leasing (In re White River Corp.)*, 799 F.2d 631 (10th Cir. 1986) and properly found that a date of delivery rule should apply to Section 547(b) preference actions. (App. B to Petition, 16a-17a.)

The Trustee appealed the decision of the District Court to the United States Court of Appeals for the Tenth Circuit on March 29, 1990. (J.A. 3). The parties' briefs were filed between May 8, 1990 and June 25, 1990. (J.A. 3).

The Tenth Circuit Court of Appeals filed its Opinion on April 30, 1991. (J.A. 3). The Tenth Circuit concluded that a date of honor rule, rather than a date of delivery rule, should apply to actions under Section 547(b), and reversed the District Court's decision. (App. A to Petition, 11a.) The Tenth Circuit rejected the lower Court's reliance on the *White River* case. Acknowledging a split in the decisions of the Circuit Courts of Appeal, the Tenth Circuit cited three bases for its decision: (1) that the purposes and functions of Sections 547(b) and 547(c) differ, supporting different rules for when a transfer occurs under the Sections; (2) that a date of honor rule is consistent with the provisions of the Uniform Commercial Code; and (3) that a date of honor rule is capable of easier proof than a date of delivery rule and less subject to manipulation. (App. A to Petition, 4a-11a.)

For purposes of proceedings on appeal, the parties have stipulated to the following material facts:

1. Debtors or their agents delivered a check in the amount of $157,148.22 to petitioner William Barnhill, or his agents, on November 18, 1985;

2. The check was dated November 19, 1985;

3. The drawee bank honored the check on November 20, 1985;

4. The 90th day before the bankruptcy petition was filed was November 20, 1985.

SUMMARY OF THE ARGUMENT

The United States Court of Appeals for the Tenth Circuit held that, for purposes of establishing a voidable preference under 11 U.S.C. § 547(b), when payment to a creditor is by check, the effective date of transfer is the date the check is honored by the drawee bank, rather than the date the check is delivered to the creditor. (App. to Petition, 11a.) Petitioner, William Barnhill, submits that the Tenth Circuit's decision was incorrect as a matter of law. Statutory construction of the provisions of 11 U.S.C. § 547(b), (c) and (e), and of 11 U.S.C. § 101(54), which defines the term transfer, establish that the effective date of transfer is the date of the transaction between the debtor and the creditor. Further, the legislative history of enactment of the Bankruptcy Code demonstrates Congress' intent that the date of delivery of a check should be the transfer date. A date of delivery rule is consistent with modern commercial practice and the provisions of

the Uniform Commercial Code that payment by check is the equivalent of a cash transaction. A rule under Section 547(b) that the date of delivery of a check is the date of transfer is also consistent with rules governing the provisions of Section 547(c) and (e) and furthers the congressional purpose of establishing a bankruptcy law that is uniform in its operation and its application. The date of delivery of a check should be the effective date of transfer for purposes of establishing a voidable preference under 11 U.S.C. § 547(b).

ARGUMENT

The sole issue presented by this case is whether, when payment is made by check, a date of delivery rule or a date of honor rule should apply to establish the date of transfer under the preference section of the Bankruptcy Code, 11 U.S.C. § 547(b).

In its decision in this case, the United States Court of Appeals for the Tenth Circuit adopted a date of honor rule, based on three grounds: (1) that the adoption of a date of delivery rule for purposes of the exceptions to the avoidance power set out in 11 U.S.C. § 547(c) does not require adoption of the same rule for Section 547(b), (App. to Petition, 4a); (2) that a date of honor rule is more in conformity with the provisions of the Uniform Commercial Code (App. to Petition, 8a); and (3) that a date of honor rule is easier to prove and less subject to manipulation than a date of delivery rule. (App. to Petition, 10a.)

In deciding the same issue, other Circuit Courts of Appeals have divided over whether a date of delivery

rule or a date of honor rule should apply. Courts which have adopted a date of delivery rule have done so based on conclusions that the same rule should apply to the avoidance powers under 11 U.S.C. § 547(b) as applies for the defenses to the avoidance powers in 11 U.S.C. § 547(c), and that a date of delivery rule is more in conformity with commercial reality that check transactions are intended to be the equivalent of payment in cash. *See, Counts v. Wang Laboratories, Inc. (In re Virginia Information Systems)*, 932 F.2d 338 (4th Cir. 1991); *Official Unsecured Creditors Committee of Belknap, Inc. v. Shaler Corp. (In re Belknap, Inc.)*, 909 F.2d 879 (6th Cir. 1990); *Robert K. Morrow, Inc. v. Agri-Beef Co. (In re Kenitra, Inc.)*, 797 F.2d 790 (9th Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987).

In addition to the United States Court of Appeals for the Tenth Circuit, the Courts of Appeals for the Eleventh and Seventh Circuits have also adopted a date of honor rule in cases decided under the former Bankruptcy Act. *Nicholson v. First Investment Co.*, 705 F.2d 410 (11th Cir. 1983); *Fitzpatrick v. Philco Finance Corp.*, 491 F.2d 1288 (7th Cir. 1974). The Eighth and Third Circuits have additionally indicated, *in dicta*, that they would apply a date of honor rule. *Kroh Brothers Development Co. v. Continental Construction Engineers, Inc. (In re Kroh Brothers Development)*, 930 F.2d 648, 650-51 (8th Cir. 1991); *In re New York City Shoes, Inc.*, 880 F.2d 679, 681 n.2 (3rd Cir. 1989).

I. PREFERENTIAL TRANSFERS UNDER SECTION 547 OF THE BANKRUPTCY CODE

Congress enacted the Bankruptcy Code in 1978. In enacting the Code, Congress included a provision making

certain preferential payments by debtors voidable by a trustee in bankruptcy. The provision relating to preferences was codified as 11 U.S.C. § 547. *Begier v. Internal Revenue Service*, ___ U.S. ___, 110 S.Ct. 2258, 2262 (1990).

The trustee's powers to avoid certain preferential transfers of an interest in property of the debtor made within 90 days of filing of the petition for bankruptcy are set out in 11 U.S.C. § 547(b). In order to establish a preferential transfer, the trustee has the burden of proving (1) that a transfer was made to or for the benefit of the creditor, (2) for or on account of an antecedent debt, (3) made while the debtor was insolvent, (4) made on or within 90 days of filing of the petition, and (5) that the transfer enabled the creditor to receive more than the creditor would have if the case were a case under Chapter 7 of the Bankruptcy Code, and the transfer had not been made to the creditor. 11 U.S.C. § 547(b)(1)-(4).

Section 547(b) was enacted in furtherance of the policy of equality of distribution among creditors of equal priority. *Begier v. Internal Revenue Service*, ___ U.S. ___, 110 S.Ct. 2258, 2262 (1990). The purpose of the section is to facilitate distribution of the debtor's assets among creditors. H.R. Rep. No. 595, 95th Cong. 1st Sess. 177-78, *reprinted in* 1978 U.S. Code Cong. & Admin. News, 5963, 6138.[2] To accomplish this purpose, Congress created an

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[2] The House Report states as follows:

> The purpose of the preference section is two-fold. First, by permitting the trustee to avoid pre-bankruptcy transfers that occur within a short period

(Continued on following page)

arbitrary time period of 90 days prior to filing of the bankruptcy petition. Creditors paid before this period may keep the payment, while creditors paid on or within the 90 day period must disgorge the payment to be shared with other creditors. *See, e.g., Yellowhouse Machinery Co. v. Mack (In re Hughes)*, 704 F.2d 820, 822 (5th Cir. 1983).

The companion provision to Section 547(b) is 11 U.S.C. § 547(c), which sets out exceptions to the trustee's avoidance powers. The Bankruptcy Code, in Section 547(c), contains seven specific statutory exceptions to the trustee's avoidance power under Section 547(b). Transfers made in the ordinary course of business and contemporaneous exchanges for new value are excluded from the reach of the voidability provisions. 11 U.S.C. § 547(c)(1)

(Continued from previous page)

> before bankruptcy, creditors are discouraged from racing to the courthouse to dismember the debtor during his slide into bankruptcy. The protection thus afforded the debtor often enables him to work his way out of a difficult financial situation through cooperation with all of his creditors. Second, and more important, the preference provisions facilitate the prime bankruptcy policy of equality of distribution among creditors of the debtor. Any creditor that received a greater payment than others of his class is required to disgorge so that all may share equally. The operation of the preference section to deter "the race of diligence" of creditors to dismember the debtor before bankruptcy furthers the second goal of the preference section – that of equality of distribution.

H.R. Rep. No. 595, 95th Cong. 1st Sess. 177-78 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6138.

and (2). The exceptions to the avoidance power in Section 547(c) are raised as defenses to the trustee's action, and the burden of proving the exceptions is on the creditor.

The exceptions to the trustee's avoidance power were intended to encourage creditors to come to the aid of financially troubled businesses and to protect ordinary business transactions. The Section 547(c) exceptions were intended to encourage trade creditors and other suppliers of goods and services to continue dealing with troubled businesses without fear of the trustee's avoidance powers. *See Bernstein v. RJL Leasing (In re White River Corp.)*, 799 F.2d 631, 634 (10th Cir. 1986).

In an action for avoidance of a preferential transfer, a primary issue generally is whether the debtor transferred an interest in property within the 90 day period prior to filing of the bankruptcy petition. 11 U.S.C. § 547(b)(4). The term "transfer" is defined in 11 U.S.C. § 101(54), rather than in Section 547. Section 101(54) defines "transfer" to mean every mode of disposing of or parting with property or with an interest in property, whether direct or indirect, absolute or conditional, voluntary or involuntary. 11 U.S.C. § 101(54). The definition of "transfer" in the Code was intended to be broad, and includes payment by check. H.R. Rep. No. 595, 95th Cong., 1st Sess. 314, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6270.

II. A DATE OF DELIVERY RULE SHOULD APPLY TO TRANSFERS UNDER 11 U.S.C. § 547(b)

The question presented in this case is when a transfer of interest in property of the debtor occurs where

payment is made by check. 11 U.S.C. § 547(b). The legislative history relating to enactment of the Bankruptcy Code, as well as commercial practice and the policies underlying the Bankruptcy Code support a conclusion that the transfer occurs on the date the check is delivered to the creditor, rather than the date the check is honored by the drawee bank.

A. LEGISLATIVE HISTORY SUPPORTS A DATE OF DELIVERY RULE

The legislative history relating to the 1978 enactment of the Bankruptcy Code establishes that Congress intended that, for purposes of the provisions relating to preferential transfers under 11 U.S.C. § 547, when payment is made by a check, the transfer should be effective on the date of delivery of the check. The report of the House Committee on the Judiciary, in referring to 11 U.S.C. § 547(c), originally indicated that a check is a credit transaction.[3] In separate statements, both

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[3] The House Report states:

> The first exception is for a transfer that was intended by all parties to be a contemporaneous exchange for new value, and was in fact substantially contemporaneous. *Normally, a check is a credit transaction.* However, for the purposes of this paragraph, a transfer involving a check is considered to be "intended to be contemporaneous" and if the check is presented for payment in the normal course of affairs, which the Uniform Commercial Code specifies as 30 days, U.C.C. § 3-503(2)(a), that will amount to a transfer that is "in fact substantially contemporaneous."

H.R. Rep. No. 595, 95th Cong., 1st Sess. 373, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6329 (emphasis added).

Representative Edwards and Senator DeConcini contradicted the statement in the House Report that payment by a check is normally considered a credit transaction. Both statements provided that "contrary to language contained in the House Report, payment of a debt by means of a check is equivalent to a cash payment, unless the check is dishonored. Payment is considered to be made when the check is delivered for purposes of sections 547(c)(1) and (2)." 124 Cong. Rec. H 11097 (Daily ed. Sept. 28, 1978), *reprinted in* Collier on Bankruptcy, App. 3 at IX-102 (15th Ed. 1991); 125 Cong. Rec. S 17414 (Daily ed. Oct. 6, 1978), *reprinted in* Collier on Bankruptcy, App. 3 at X-29 (15th Ed. 1991).

Although the statements of Representative Edwards and Senator DeConcini were made in the context of Section 547(c), there is nothing in the legislative history indicating congressional intent that a different rule should apply to Section 547(b). To the contrary, the legislative history is a clear indication that the drafters considered a check transaction to be the equivalent of a cash payment, and that a transfer should be considered to be effective upon delivery of the payment. *See, Countryman, The Concept of A Voidable Preference in Bankruptcy,* 38 Vand. L.Rev. 713, 761 (1985); *Official Unsecured Creditors Committee of Belknap, Inc. v. Shaler Corp. (In re Belknap, Inc.),* 909 F.2d 879, 883 (6th Cir. 1990).

The conclusion that Congress intended a date of delivery rule to apply is reinforced by the provisions of 11 U.S.C. § 547(e)(2), which provide that a transfer is made at the time the transfer takes effect between the transferor and the transferee, if the transfer is perfected at or within 10 days after such time. 11 U.S.C.

§ 547(e)(2)(A). Most courts have concluded that 11 U.S.C. § 547(e) applies only to secured transactions, and not to check transactions. *See, e.g., Braniff Airways, Inc. v. Midwest Corp.*, 873 F.2d 805 (5th Cir. 1989); *Durham v. Smith Metal and Iron Co. (In re Continental Commodities, Inc.)*, 841 F.2d 527 (4th Cir. 1988).

However, the provision that a transfer is effective as of the date of the transaction between the debtor and creditor for purposes of 11 U.S.C. § 547(e) is consistent with the legislative history that Congress intended a transfer to be effective for purposes of 11 U.S.C. § 547(c) at the time the debtor delivers the check to the creditor.[4] The consistency of the two sections, that a transfer occurs at the time of the transaction between the debtor and the creditor, is clearly indicative of congressional intent that a date of delivery rule should apply for all purposes under 11 U.S.C. § 547.

B. COMMERCIAL PRACTICE AND THE UNIFORM COMMERCIAL CODE SUPPORT A DATE OF DELIVERY RULE

The provisions of 11 U.S.C. § 547 relating to preferences modified pre-existing law under the former Bankruptcy Act. The modifications were intended to bring bankruptcy law relating to avoidance of preferential transfers "more into conformity with commercial practice

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[4] The provision that the date of transfer relates back to the date of the transaction if the security interest is perfected within ten days is analogous to a date of delivery rule for checks, where the check is presented within the 30 day period for presentment under U.C.C. § 3-503.

and the Uniform Commercial Code." H.R. Rep. No. 595, 95th Cong., 1st Sess. 372, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6328. Both modern commercial practice and the Uniform Commercial Code support adoption of a date of delivery rule as the effective date of transfer.

Under modern commercial practice, for most purposes, payment by check is considered to be a cash transaction and is the end of the commercial transaction. *See, e.g., Counts v. Wang Laboratories, Inc. (In re Virginia Information Systems Corp.)*, 932 F.2d 338, 342 (4th Cir. 1991). "In the commercial world receipt of a check, as distinguished from the date it clears the drawee bank, is customarily looked upon as the date of payment of an obligation." *Young Supply Co. v. McCouth Steel Corp.*, 55 Bankr. 356, 357 (E.D. Mich. 1985). *See, also, Bernstein v. RJL Leasing (In re White River Corp.)*, 799 F.2d 631, 633 (10th Cir. 1986). Therefore, under modern commercial practice, transfer is complete when the check is delivered from the debtor to the creditor.

The provisions of the Uniform Commercial Code (U.C.C.), as adopted by the several states, reflect modern commercial practice that, when payment is made by check, the transaction is complete upon delivery.[5] Under the Uniform Commercial Code, the cause of action against the maker of a check accrues upon the date of the check. U.C.C. § 3-122. The check is negotiated to the payee *by delivery* with any necessary endorsement. U.C.C.

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[5] New Mexico has adopted the provisions of the U.C.C. *See*, N.M. Stat.Ann. § 55-1-101 through § 55-12-108 (1978).

§ 3-202. As of the date of delivery, then, the maker of the check has negotiated the check, and a cause of action exists against the maker. While the drawee bank is not obligated to honor the check at that point, the maker of the check is still liable on the instrument. U.C.C. § 3-122.

Where the maker of the check is the debtor, then, as of the date of delivery of the check to the creditor, even though the delivery may be conditional, the debtor has disposed of or parted with property or an interest in property as defined in 11 U.S.C. § 101(54). A rule that the date of delivery is the date of transfer for purposes of 11 U.S.C. § 547(b) accords with the provisions of the Uniform Commercial Code.

III. ADOPTION OF A UNIFORM RULE FOR SECTION 547 FURTHERS BANKRUPTCY POLICIES

The courts have consistently held that, for purposes of determining the date of transfer for the exceptions to the avoidance powers under 11 U.S.C. § 547(c), transfer occurs upon delivery of the check. *See, e.g., Bernstein v. RJL Leasing (In re White River Corp.)*, 799 F.2d 631, 633 (10th Cir. 1986); *O'Neill v. Nestle Libbys P.R., Inc.*, 729 F.2d 35, 37-38 (1st Cir. 1984). The adoption of a date of delivery rule is based on the legislative history that the drafters intended a date of delivery rule to apply. *See*, statements of Representative Edwards and Senator DeConcini, 124 Cong. Rec. H 11097 (Daily Ed. Sept. 28, 1978); 124 Cong. Rec. S 17414 (Daily Ed. Oct. 6, 1978).

In its decision in this case, the Tenth Circuit Court of Appeals rejected the Bankruptcy Court and District Court's reliance on its prior decision in *White River*. The

Tenth Circuit concluded that, because the purposes of 11 U.S.C. § 547(b) and 11 U.S.C. § 547(c) are different, the date of transfer need not be the same for both sections. (App. to Petition, 4a.) The Tenth Circuit's decisions in *White River* and in this case, then, establish two different rules for the companion provisions of Section 547(b) and Section 547(c).

One of the primary goals of Congress in enacting the 1978 Bankruptcy Code was to establish a uniform law on the subject of bankruptcies. H.R. Rep. No. 595, 95th Cong., 1st Sess. 1, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963. The express congressional intent that a date of delivery rule apply to 11 U.S.C. § 547(c) and the inclusion of a provision that the date of transfer for secured transactions relates back to the transaction between the debtor and creditor if perfected within 10 days, reflect the congressional goal of uniformity in the bankruptcy laws. Adoption of a date of delivery rule for Section 547(b) further serves to advance this goal of uniformity.

The adoption of a rule that, when payment is made by check, the date of transfer is the date of delivery of the check under Section 547(b) is also consistent with the policies underlying the avoidance provisions of that section. The legislative history establishes that the purpose of Section 547(b) was to promote equality of distribution of the debtor's assets among creditors. The bankruptcy trustee was given the power to avoid certain transfers in order to further that goal. *Begier v. Internal Revenue Service*, ___ U.S. ___, 110 S.Ct. 2258, 2262 (1990). The 90 day period selected by Congress was, however, an arbitrary period. *Yellowhouse Machinery Co. v. Mack (In re Hughes)*,

704 F.2d 820, 822 (5th Cir. 1983). Adoption of a rule governing whether a particular check transaction falls in or out of that arbitrary period does not alter the trustee's avoidance powers. Although a particular transfer may not be voidable, because the effective date of the transaction falls outside the 90 day period, the adoption of a date of delivery rule does not limit the avoidance power nor alter equality of distribution of assets to other creditors.

IV. THE UNIFORM COMMERCIAL CODE SHOULD NOT LIMIT THE DEFINITION OF TRANSFER

The Tenth Circuit, in its decision below, relied on U.C.C. § 3-409(1) to support its determination that the effective date of transfer should be the date the drawee bank honors the check. (App. to Petition, 8a-10a.) U.C.C. § 3-409(1) states that "a check or other draft does not of itself operate as an assignment of any funds in the hands of the drawee available for its payment, and the drawee is not liable on the instrument until he accepts it." Although it was clearly Congress' intent to create greater uniformity between the bankruptcy laws and the Uniform Commercial Code as adopted by the states, the question of when a transfer occurs under the Bankruptcy Code is a federal question requiring construction of a federal statute. *Official Unsecured Creditors Committee of Belknap, Inc. v. Shaler Corp. (In re Belknap, Inc.)*, 909 F.2d 879, 881-82 (6th Cir. 1990). *See, e.g., Toibb v. Radloff*, ___ U.S. ___, 111 S.Ct. 2150 (1991).

The definition of "transfer" contained in the Bankruptcy Code is a broad definition. The definition includes every mode of disposing of or parting with property,

regardless of whether the transfer is absolute or conditional. 11 U.S.C. § 101(54). The House Report indicates that, in defining the term "transfer," Congress intended to delete all potentially limiting words from the definition. H.R. Rep. No. 595, 95th Cong., 1st Sess. 314, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6270.

The Tenth Circuit Court, relying on U.C.C. § 3-409(1), indicated that a date of honor rule ought to apply because, until a check is actually accepted, circumstances could ensure that a transfer never be made, such as garnishment of the bank account, or a stop-payment order by the debtor. (App. to Petition, 9a.) The fact that intervening circumstances between the date of delivery and the date of honor could prevent the transfer, however, should not, for two reasons, serve as a basis for adoption of the date of honor rule. First, if no transfer occurs, there is no cause of action for avoidance of a preferential transfer. A rule governing the time when a transfer occurs under 11 U.S.C. § 547 should not be adopted based on hypothetical circumstances that could never invoke application of the provisions of Section 547.

Second, the fact that post-delivery circumstances may arise to prevent a transfer only means that delivery of the check is a conditional transfer. By analogy, a rule which gives effect to the date of delivery of the check as the date of transfer, if the check is ultimately honored, is no different than the relation back provision of 11 U.S.C. § 547(e) providing that the transfer relates back to the date of the transaction if the security interest is perfected within 10 days. *See, e.g., Global International Airways Corp. v. Evergreen Air Center, Inc. (In re Global International Airways*

Corp.), 80 Bankr. 990, 995 at n.9 (Bankr. W.D. Mo. 1987). *See, also,* U.C.C. § 3-503.

The definition of "transfer" in the Bankruptcy Code clearly contemplates that conditional payments be included in the definition. 11 U.S.C. § 101(54). Requiring that the check be honored by the drawee bank before a transfer will be deemed to have occurred requires that the transfer be absolute. The date of honor rule, then, effectively reads a limitation into the definition of "transfer," contrary to express legislative intent to remove all limiting language from the definition of transfer in the Bankruptcy Code.

V. EASE OF PROOF AND MANIPULATION ARE NOT GROUNDS FOR A DATE OF HONOR RULE

The Tenth Circuit based its holding in part on a finding that (1) a date of honor rule is easier to prove, and (2) that adoption of the date of delivery as the effective date of transfer would make transactions more susceptible to manipulation by a debtor. (App. to Petition, 10a-11a.) The two grounds articulated by the Tenth Circuit are not proper grounds for deciding the question in this case.

The issue presented by this case is a question calling for construction of federal statutory law. *Official Unsecured Creditors Committee of Belknap, Inc. v. Shaler Corp. (In re Belknap, Inc.)*, 909 F.2d 879, 881-82 (6th Cir. 1990). Resolution of a question of federal statutory law should be based on principles of statutory construction and legislative intent as established by the legislative history. Questions relating to the trustee's burden of

proof, however, are governed by the Federal Rules of Evidence. Fed.R.Evid. 101. The rule of law established by the decision in this case should be based on statutory construction of the Bankruptcy Code, rather than evidentiary considerations. *Pauley v. Bethenergy Mines, Inc.*, ___ U.S. ___, 111 S.Ct. 2524, 2533 (1991).

The fact that a debtor with knowledge of the 90 day preference period under the Bankruptcy Code can manipulate the date of delivery to prefer one creditor over another is similarly not a basis for adopting either a date of delivery or a date of honor rule when payment is made by check. First, a knowledgeable debtor controls the date of transfer and can prefer one creditor over another regardless of whether payment is made by check or by some other medium. *See, e.g.*, 11 U.S.C. § 547(e). Different rules should not be adopted based solely on the fact that the medium of payment is a check.

Further, under a date of honor rule, the transfer date is also subject to manipulation. Applying a date of honor rule, rather than a date of delivery rule, a drawee bank, which is also a creditor and which has inside knowledge of the debtor's financial condition, would be able to manipulate the date of transfer, thereby bringing transactions within the 90 day period that ordinarily would not have constituted preferential transfers. *Official Unsecured Creditors Committee of Belknap, Inc. v. Shaler Corp. (In re Belknap, Inc.)*, 909 F.2d 879, 882, n.2 (6th Cir. 1990). *See, also, Bernstein v. RJL Leasing (In re White River Corp.)*, 799 F.2d 631, 634 (10th Cir. 1986), indicating that a holding that the transfer occurs on the date the check is delivered allows the debtor, as opposed to the bank, to determine the precise date of transfer.

CONCLUSION

For purposes of establishing a voidable preference under 11 U.S.C. § 547(b), when payment is made by check, the effective date of transfer should be the date the check is delivered to the creditor, rather than the date the check is honored by the payee bank. Adoption of a date of delivery rule is supported by the legislative history that Congress intended payments by check to be the equivalent of cash transactions in conformity with modern commercial practice and the Uniform Commercial Code. Adoption of a date of delivery rule also furthers congressional purposes of uniformity in operation and application of the bankruptcy laws. Therefore, the petitioner, William Barnhill, would respectfully request that this Court reverse the decision of the United States Court of Appeals for the Tenth Circuit, and remand the case for dismissal in accordance with the March 1, 1989 Order of the United States Bankruptcy Court for the District of New Mexico.

Respectfully Submitted,

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